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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73 559

HECK'S, INC.,

Petitioner,

vs.

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Respondents

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Respondents.

PETITION BY HECK'S, INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, MOTION OF HECK'S TO INTERVENE BEFORE THIS COURT AND BRIEF IN SUPPORT OF MOTION TO INTERVENE.

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Heck's, Inc. petitions for a writ of certiorari to review the portion of the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case that denied Pe-

titioner's motion to intervene and enlarged the remedies ordered by the Board. In the alternative, Heck's moves to intervene directly in this proceeding and files this document as a brief in support of its Motion to Intervene, as well as support for its Petition.

OPINIONS BELOW.

The opinion of the court of appeals (App. 1A-20A)[1] is reported at 476 F. 2d 546. The Board's supplemental decision and order are reported at 191 NLRB No. 146 (App. 21A-36A).[2]

JURISDICTION.

The judgment of the court of appeals was entered on April 26, 1973 (App. 16A-20A). The Petitioner's motion for intervention was denied by that court by an order dated May 18, 1973. A petition for rehearing from the denial of intervention was denied by that court on June 29, 1973. The jurisdiction of this Court is evoked under 28 U. S. C. 1254(1).[3]

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1. "App." refers to the appendix to this petition.

2. The earlier decisions of the court of appeals and of the Board are reported at 433 F. 2d 541 and 172 NLRB 2231, respectively.

3. This Court has held that Section 1254(1) permits it to review orders denying intervention, *International Union, UAW, Local 283* v. *Scofield*, 383 U. S. 205 (1965).

QUESTIONS PRESENTED.

A. Whether a person must be granted intervention as of right in proceedings before an appellate court even after that court has issued a decision when intervention is necessary to preserve interests which have been adversely affected by that decision, and which cannot otherwise be protected.

B. Whether the Board possesses power to assess collateral or punitive relief and whether the appellate court exceeded its authority by enlarging the remedies chosen by the Board.

C. Whether a person, not present during the court's proceedings but who will be adversely affected by the appellate court's decision to enlarge or modify the Board's remedial order, must be given official notice of the Court's contemplated decision and allowed an opportunity to present his views before the Court's decision becomes effective.

STATUTE AND RULE INVOLVED.

Section 10 of the National Labor Relations Act, 29 U. S. C. 160, in part provides:

> "(e) The Board shall have power to petition any court of appeals of the United States . . . for the enforcement of such order . . . Upon the filing of such petition, the court . . . shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . .
>
> "(f) If any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . ."

In addition, Rule 24(a)(2) of the Federal Rules of Civil Procedure states:

> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

STATEMENT.

Following the Board's decision where the Petitioner was found to have violated the National Labor Relations Act and ordered to cease and desist from interfering with, restraining or coercing its employees in the exercise of their statutory rights and to bargain in good faith with the Union (172 NLRB 2231, 2232-2233, 2239), the court of appeals enforced the Board's order but remanded the case to the Board for that agency's reconsideration of the Union's request for additional remedies (433 F. 2d 541). On remand, the Board granted some of the remedies requested by the Union, but denied others, including the Union's request that it be reimbursed for litigation and organizational expenses incurred because of Petitioner's conduct. The court of appeals then enforced the Board's amended order and, while partly agreeing with the Board's rejection of the Union's request for extraordinary relief, concluded that reimbursement of litigation and organizational expenses would be appropriate under the circumstances of this case. The court then enlarged the Board's order to include reimbursement for these expenses and remanded solely for a compliance determination of the exact amounts involved.

Petitioner sought to intervene on April 4, 1973, and its motion was denied by the court on May 18, 1973. Petitioner's petition for rehearing from the denial of intervention was denied by the court on June 29, 1973.

REASONS FOR GRANTING THE WRIT.

Certiorari is sought to review the following important questions: *A*. Whether a person must be granted intervention as of right in proceedings before an appellate court even after that court has issued a decision when intervention is necessary to preserve interests which have been adversely affected by that decision and which cannot otherwise be protected. As a corollary to this issue are the related issues of (1) whether a person aggrieved by an order of the appellate court, though not present during the proceedings, has a right to petition for rehearing or to this Court for *certiorari* and (2) whether a motion to intervene is untimely solely because it occurred after the decision of the court of appeals when intervention is necessary to preserve a right which cannot otherwise be protected; *B*. Whether the Board possesses power to assess collateral or punitive relief and whether the appellate court exceeded its authority by enlarging the remedies chosen by the Board, and *C*. Whether a person, not present during the court's proceedings but who will be adversely affected by the appellate court's decision to enlarge or modify the Board's remedial order, must be given official notice of the Court's contemplated decision and allowed an opportunity to present his views before the Court's decision becomes effective.

These issues are of significance to Petitioner because the decision of the court of appeals which greatly and materially expanded the relief provided by the NLRB has critically affected the Petitioner's legally recognized private rights. In addition, these issues are important to the orderly development of the law because these issues involve a clarification of the requirements of intervention, because they involve a determination of the remedial powers of the Board and appellate courts, and because they will enable this Court to void a decision of the

District of Columbia Circuit which is in conflict with this Court's decisions in *United Automobile Workers* v. *Scofield (Fafnir Bearing Co.),* 382 U. S. 205 and *Trbovich* v. *Mine Workers,* 404 U. S. 528 (1972).

Before turning specifically to Petitioner's right to intervene before the Appellate Court Petitioner will first discuss the general principles of intervention and then turn to the trend toward allowing parties aggrieved by judicial or agency decisions to advance and protect their own interests. Petitioner will then discuss the applicability of these principles to its right to intervene. Thereafter, Petitioner will turn to the merits and due process questions.

I.

PETITIONER MUST BE GRANTED INTERVENTION OF RIGHT IN PROCEEDINGS BEFORE AN APPELLATE COURT EVEN AFTER THAT COURT HAS ISSUED A DECISION WHEN INTERVENTION IS NECESSARY TO PRESERVE INTERESTS WHICH HAVE BEEN ADVERSELY AFFECTED BY THAT DECISION, AND WHICH CANNOT OTHERWISE BE PROTECTED.

A. The General Principles of Intervention Give One a Right to Intervene if (1) He Claims a Sufficient Interest in the Proceedings, (2) This Interest May Be Adversely Affected by Disposition of the Proceedings, and (3) This Interest Is Not Adequately Represented by Existing Parties.

In *Trbovich* v. *Mine Workers, supra,* this Court discussing Rule 24(a)(2) adopted a liberal view of intervention stating that a party has a right to intervene if he claims "a sufficient interest in the proceedings, and . . . that interest is not 'adequately represented by existing parties.'" This Court also stated in *Trbovich* that the requirements of the Rule are satisfied if the applicant shows that "representation of his interests 'may be' inadequate; and the burden of making that showing should be treated a minimal". This Court has observed that

while the Federal Rules of Civil Procedure apply only in federal district courts, the policies underlying intervention are applicable in appellate courts.[4] Accordingly, Petitioner will turn to several decisions in the lower courts that, consistant with *Trbovich*, hold a liberal view of intervention.

One court has recently stated that intervention should turn on "practical considerations."[5]

1. The Claim of Interest.

While courts have not always articulated the type of interest required, if "there is a direct substantial legally protectable interest in the proceedings, it is clear that this requirement of the rule is satisfied."[6] Two courts have recently examined the meaning of the concept of interest under Rule 24(a)(2).[7]

In *Nuesse*, the Court observed that the interest "test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." At 700. In a subsequent opinion the same court continued to liberally construe the concept of interest. In *Smuck*, the Court said:

> "[T]he requirement should be viewed as a prerequisite rather than relied upon as a determinative criterion for intervention. If barriers are needed to limit extension of the right to intervene, the criteria of practical harm to the applicant and the adequacy of representation by others are better suited to the task." At 179-180.

Once interest sufficient to satisfy the rules is found, or if as *Nuesse* and *Smuck* suggest, it is not necessary to view this concept as a barrier to intervention, it is necessary to turn to the

4. *Scofield, supra* footnote 10, at 217.

5. *American Jerex Co.* v. *Universal Aluminium Extrusion, Inc.*, 340 F. Supp. 524, 531 (EDNY, 1972).

6. Wright and Miller, *Federal Practice and Procedure*, Section 1908, at p. 504, 1972.

7. *Neusse* v. *Kamp*, 385 F. 2d 694 (CA DC, 1967); *Smuck* v. *Hobson*, 408 F. 2d 175 (CA DC, 1969).

second requirement of Rule 24(a)(2): this interest may be adversely affected by disposition of the proceedings.

2. The Interest May Be Adversely Affected by Disposition of the Proceedings.

According to one commentator, this part of the Rule "is satisfied whenever disposition of the present action would put the applicant [seeking intervention] at a practical disadvantage in protecting his interest."[8] Courts, as well as this commentator, have interpreted this requirement of the Rule practically and liberally. *Smuck* v. *Hobson*, 408 F. 2d 175 (CA DC, 1969); *Atlantis Development Corp.* v. *United States*, 379 F. 2d 818 (CA 5, 1967).

We now turn to the third requirement of the rule: the interest is not adequately represented by existing parties. We will see that this requirement, like the two previous requirements, is treated liberally and practically with little needed to demonstrate that representation may be inadequate.

3. The Interest Is Not Adequately Represented by Existing Parties.

This Court has recently pronounced that this requirement "is satisfied if the applicant shows that representation of his interests 'may be' inadequate; and the burden of making that showing should be treated as minimal."[9] *Trbovich* considered

> ". . . whether an individual Union member could intervene under Rule 24(a) of the Federal Rules of Civil Procedure in a suit filed by the Secretary of Labor against the Mine Workers. The individual seeking to intervene had filed the initial complaint with the Secretary of Labor that led to the Secretary's suit."

The Secretary contended that the petitioner's interest was identical with the interest represented by the Secretary and therefore

8. Wright and Miller, *Federal Practice and Procedure*, Section 1908 at p. 151, *supra*.

9. *Trbovich* v. *United Mine Workers of America, et al., supra* at 538, note 10 (1972).

"that petitioner's interest must be absolutely represented unless the Court is prepared to find that the Secretary has failed to perform his statutory duty." The Court disagreed, saying that "there is sufficient doubt about the adequacy of representation to warrant intervention." The Court reasoned:

> "The statute plainly imposes on the Secretary the duty to serve two distinct interests, which are related, but not identical. First, the statute gives the individual union members certain rights against their union, and 'the Secretary of Labor in effect becomes the union member's lawyer' for purposes of enforcing those rights. And second, the Secretary has an obligation to protect the 'vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union members.' Both functions are important, and they may not always dictate precisely the same approach to the conduct of the litigation. Even if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of 'his lawyer.' Such a complaint, filed by the member who initiated the entire enforcement proceeding, should be regarded as sufficient to warrant relief in the form of intervention under Rule 24(a)(2)." (Citations omitted.)

Trbovich is one of the recent cases which recognize that "interests need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate."[10]

In analyzing this requirement of the Rule, the Court of the District of Columbia Circuit has been in the forefront of a liberal interpretation and has resolved doubts in favor of allowing the applicant, who has an interest different from that of any existing party, to intervene so that he may be heard in his own behalf. Intervention is to be permitted, if the other conditions of the Rule are satisfied, unless the court is persuaded that the representation of the applicant seeking intervention is, in fact, adequate. *Smuck* v. *Hobson, supra,* at 181. And, in

10. *Nuesse* v. *Kamp, supra,* at 703.

Nuesse v. *Kamp, supra,* the Court stated "that the wording of the current Rule underscores both the burden on those opposing intervention to show the adequacy of the existing representation and the need for a liberal application in favor of permitting intervention." At 702. We will turn now to the requirement that the application to intervene must be "timely," and will see that consistent with the liberal interpretation accorded to applicants seeking to intervene, this requirement, too, is treated flexibly and liberally.

B. While an Application to Intervene as a Matter of Right or as a Matter of Discretion Must Be Timely, This Requirement Is Treated Liberally.

Though under Rules 24(a) and (b) an application to intervene must be timely, the requirement of "timeliness" is flexible and should be employed "to regulate intervention in the interest of justice."[11] Moreover, a liberal standard is used to measure timeliness when dealing with interventions as of right. One commentator has stated:

> "Even though the requirement of timeliness applies to both intervention of right and permissive intervention, a different standard is used, depending on the type of intervention sought, in determining what is timely. Since in situations in which intervention is of right the would-be intervenor may be seriously harmed if he is not permitted to intervene, courts should be reluctant to dismiss a request for intervention as untimely, even though they might deny the request if the intervention were merely permissive."[12]

Consistent with the liberal treatment that is to be accorded applications for intervention by right is *Hodgson* v. *Mine Workers,* 473 F. 2d 118 (CA DC, 1972). There, the applica-

11. *McDonald* v. *E. J. Lavino Co.,* 430 F. 2d 1065, 1074 (CA 5, 1970).

12. Wright and Miller, *Federal Practice and Procedure,* Section 1916, at page 573, 1972.

tion for intervention was made after the action was tried and seven years after it was filed. The intervenors sought only to participate in the remedial and if necessary the appellate phases of the case and did not desire to reopen any previously litigated question. The court held that the intervenors' goal did not impose any untoward burden on the parties to the proceeding or the court and stated:

> "Timeliness presents no automatic barrier to intervention in post-judgment proceedings where substantial problems in formulating relief remain to be resolved. As we declared in *Wolpe* v. *Poretsky*, intervention '. . . may be allowed [even] after a final decree where it is necessary to preserve some right which cannot otherwise be protected.'" (at 129)

The applicants in Hodgson sought to intervene in order to assure that their interest in effective dismantling of unlawful trusteeship in union districts was safeguarded. The applicants contended that the decree which the Secretary of Labor submitted to the district court would not restore full autonomy to the trusteed districts and would not achieve the relief which the applicants themselves would reasonably ask. Consequently, concluded the court, the Secretary's representation of the applicants' interest in the remedial phase of the litigation was inadequate. The court, in permitting intervention, stated:

> "While timeliness is a prerequisite to any claim for intervention under Rule 24, it is settled—particularly where intervention is sought as of right—that the amount of time which has elapsed since the litigation began is not in itself the determinative test of timeliness. Rather, the court should also look at the related circumstances including the purpose for which intervention is sought, the necessity of intervention as a means of preserving the applicant's rights, and the improbability of prejudice to those already parties in the case." (at 129)

This trend to liberalize the requirements for intervention is consistant with the trend in other areas of the law to permit aggrieved persons to advance their own interests.

C. There Is a Trend to Permit Parties Aggrieved by Administrative or Judicial Actions to Advance Their Own Interests by Protesting These Acts in Federal Courts.

The trend permitting parties aggrieved by administrative or judicial action to advance their interests in federal courts is seen in recent developments in the concept of standing and in suits by private parties to enforce claims under the Freedom of Information Act.

1. The Concept of Standing Has Been Liberalized.

Cases showing the development of the concept of standing are of particular relevance to the question of when a party may intervene. Respected scholars and courts have expressed the view that interests which are adequate to confer standing to institute suits in federal court or to seek judicial review of administrative action are also adequate to confer the right to intervene and to participate as parties in the proceeding from which review may be sought. Professor Davis has concluded that ". . . the problem of the right to intervene in administrative proceedings is closely related to and in some measure governed by the elaborate body of law concerning standing to challenge and to enforce administrative action."[13]

This view has found judicial approval, for example, in the Court of Appeals for the District of Columbia Circuit:

> "Cases concerning the question of standing [to seek review] have been used interchangeably in resolving questions of standing to intervene. Except for the adjustments necessary for assuring manageability of administrative proceedings, the criteria for standing for review of agency actions appear to assimilate the criteria for standing to intervene." (Footnote, citations omitted.)[14]

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13. Davis, *Administrative Law Treatise*, Section 8.11 at 564 (1968).

14. *The National Welfare Rights Organization, et al.* v. *Finch, et al.*, 429 F. 2d 725 (CA DC, 1970).

Moreover, the Seventh Circuit has noted that "requirements for intervention . . . should generally be more liberal than those for standing to bring suit."[15]

Climaxing the growing trend of cases[16] which have expanded the criteria for granting standing to sue is this Courts' 1970 decision in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150. There, the petitioners sued to challenge a ruling by the Comptroller of the Currency that as an incident to their banking services, national banks may make data processing services available to other banks and to bank customers. The district court and the court of appeals dismissed the complaint for lack of standing of the petitioners to bring the suit. This Court announced the criteria for determining the existance of standing to seek review as follows:

(1) "Whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise [,]" and

(2) "Whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or Constitutional guarantee in question". At 152 and 153.

This Court continued that:

> "the Administrative Procedure Act grants standing to a person 'aggreived by agency action within the meaning of a relevant statute.' 80 Stat. 392, 5 U. S. C. Section 702. That interest, at times, may reflect 'aesthetic conservational, and recreational' as well as economic values. . . . no explicit statutory provision was necessary to confer standing . . ." at 153-155.

This Court continued:

> "As stated in the House Report:

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15. *United States* v. *Board of School Commissioners, Indianapolis, Indiana*, 466 F. 2d 573, 577 (CA 7, 1972).

16. *F. C. C.* v. *Sanders Brothers Radio Station*, 309 U. S. 470; *Abbott Laboratories* v. *Gardner*, 397 U. S. 136; *Curran* v. *Laird*, 420 F. 2d 122 (CA DC, 1969); *Scanwell Laboratories, Inc.* v. *David D. Thomas, Administrator (Acting) of the Federal Aviation Administration, et al.*, 424 F. 2d 859 (CA DC, 1970).

> 'The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. Ther mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.' H. R. Rep. No. 1980, 79th Cong., 2d Sess., 41."

The principles of *Data Processing* were recently restated by this Court in *Arnold Tours* v. *Camp*, 400 U. S. 45 (1971) where the Court restated its approval of the "growing trend toward enlargement" of the class of persons having independent standing to seek review. There a group of independent travel agents had standing to seek declaratory and injunctive relief against the Comptroller of the Currency who had ruled that banks could provide travel services to their customers.

While *Data Processing* was a case which involved the review of administrative action, it is apparent that the liberal interpretation of the concept of standing is not limited to that situation. In *Potomac Passengers Association* v. *Chesapeake and Ohio Railway Company, et al.*[17] the appellate Court stated that "[p]ublic policy favors adopting a standing test as liberal as that which has arisen in the administrative law context to determine whether a given plaintiff can sue a Congressionally created corporation to enjoin it from violating its enabling statute." at 330. *Potomac* involved the issue of whether injured and aggrieved parties have standing to seek injunctions against violations of the Amtrak Act or whether the enabling statute barred suits by all parties other than the Attorney General of the United States, employees and employee representatives. The Court found that the railroad passengers, the aggrieved parties, were the intended beneficiaries of the Amtrak Act. The Court observed that while most applications of the doctrine of standing involve review of administrative agencies, the doctrine

17. 475 F. 2d 325 (CA DC, 1973).

is not limited to such situations. The Court stated that a significant aspect of recent standing decisions is a "recognition that judicial review is necessary to insure the integrity of federal regulatory programs . . ." at 330. The Court concluded that there is a strong presumption in favor of judicial review:

> "Preclusion of judicial review 'is not lightly to be inferred'. Judicial review 'is the rule and non-reviewability an exception which must be demonstrated.' It is only 'upon a showing of clear and convincing evidence of a contrary legislative intent' that the courts should restrict access to judicial review.' " at page 331

The Court in *Potomac* then approved of the standing test pronounced by *Data Processing*.

Under the doctrine of standing as judicially developed, then, "a plaintiff whose interest it is one of the purposes of a statute to protect in whatever degree it entitled to seek review . . ."[18] if he suffers an injury of any kind in fact unless the statute expressly or by necessary implication provides otherwise. It is now clear, after *Potomac* that the applicability of *Data Processing* is not limited to situations in which a review of administrative action is involved. Moreover, the failure to provide specifically by statute for judicial review is not evidence of an intent to withhold review.

Congressional and judicial concern for the rights of private parties aggrieved by agency actions is further demonstrated by the passage and implementation of the Freedom of Information Act.

2. Private Parties May Sue Governmental Agencies to Enforce Congressionally Recognized Claims to Information Under the Freedom of Information Act.

Further indication of Congressional and judicial concern for the rights of private parties involved in proceedings with an agency is found by considering the purposes of the Freedom of

18. Jaffe, *Standing Again,* 84 Harv. L. Rev. 633 (1970).

Information Act (FOIA). 5 U. S. C. Section 552 et seq. (1970).

The Senate manifested a direct concern for parties involved in controversies with an agency:

> "requiring the agencies to keep a current index of their orders, opinions, etc. is necessary to afford the private citizen the essential information to enable him to deal effectively and knowledgably with the Federal agencies. This change *will prevent a citizen from losing a controversy with an agency* because of some obscure and hidden order or opinion which the agency knows about but has been unavailable to the citizen simply because he had no way in which to discover it . . ." (S. R. No. 813 89th Cong., 1st Sess. 7 (1965).

The House, too displayed its concern for the rights of plaintiffs who, when involved in agency proceedings, seek information from the agency:

> "Information sought by *plaintiffs* from Government is likely to be a perishable commodity and . . . delays . . . may result in substantive damage to *plaintiff's case*. In some circumstances, such foot-dragging in the courts can render the information totally useless, if and when it is ever made available by the Federal bureaucracy." (Emphasis added) (H. R. No. 92-1419, 92nd Cong. 2nd Sess. 2 (1972)).

The *right to know* then was accorded to both plaintiffs and defendants in an agency proceeding and to the public at large and Congress has manifested concern for the protection of the rights of parties involved in a proceeding with an agency.

Consistent with and implementing Congressional concern is the decision in *The Renegotiation Board* v. *Bannercraft Clothing Company, Inc., et al.*, 466 F. 2d 345 (CA DC, 1972).[19] There, plaintiffs during litigation before an agency requested the agency to disclose certain information pursuant to the requirements of the Freedom of Information Act. The agency refused this request claiming that the Act's exemptions applied

19. Certiorari has been granted in this case (No. 72-822).

to the information requested. The plaintiffs then sought a temporary injunction from a district court in order to stay the on-going agency proceedings and to preserve the *status quo* until the court decided the merits of the FOIA claim. The District Court enjoined further agency proceedings and the Court of Appeals affirmed.

We have seen the growing trend in Congress and the courts to permit individuals adversely affected by the action of administrative agencies or by Congressionally created corporations to protect and advance their rights by resorting to legal action. Individuals are liberally granted standing to seek review of administrative action (*Data Processing, supra*); to sue to enjoin Congressionally created corporations from violating their enabling statutes (*Potomac Passengers Association*); to secure temporary injunctions to stay on-going agency proceedings until their claims for information under the FOIA are resolved so that they do not have to participate in an agency proceeding without information necessary to argue on an equal footing with an agency; and to intervene to protect their interests under the liberalized interpretations of the requirements of intervention. Therefore, it logically follows that consistent with Congressional and judicial intent that individuals be permitted to advance their rights, persons should be permitted to intervene in proceedings before an appellate court even after that court has issued a decision "where it is necessary to preserve some right which cannot otherwise be protected."[20] It is to this contention that we now turn.

20. *Wolpe* v. *Poretsky*, 144 F. 2d 505, 508 (CA DC, 1944) cert. denied 323 U. S. 777 (1944).

D. A Person Must Be Granted Intervention as of Right in Proceedings Before an Appellate Court Even After That Court Has Issued a Decision When Intervention Is Necessary to Preserve Interests Which Have Been Adversely Affected by the Court's Decision, and Which Cannot Otherwise Be Protected.

Heck's contends that it has a right to intervene in proceedings in the appellate court subsequent to that court's decision, because intervention is necessary to preserve interests which cannot otherwise be protected, and that as a corollary to this right, Heck's has a right to petition for rehearing or to this Court for *certiorari*. Heck's further contends that its application to intervene is not untimely solely because it occurred after the appellate court's decision.

1. The General Principles of Intervention Give Heck's a Right to Intervene in Proceedings Before the Appellate Court Even After That Court Has Issued Its Decision Because Such Decision Materially and Adversely Affected the Heck's Interests, and Because Intervention Is Therefore Necessary to Preserve Interests Which Cannot Otherwise Be Protected.

a. The Claim of Interest.

It is apparent that the petitioner has a direct private and financial interest in the proceedings before the Appellate Court since that Court has issued its decision and judgment. By its decision of March 21, 1973, the Court granted relief additional to and different from relief granted by the Board in its amended order. In an unprecedented decision that Court imposed upon the petitioner litigation and organizational costs to which the union was exposed by reason of the petitioner's resistance to the union's organizational efforts. Petitioner has a direct interest in being free from wrongly imposed remedies, and in defining the statutory limits of the Board's remedial powers and the extent, if any, that a court may enlarge the Board's remedial order.

Petitioner, then, has a direct interest in the scope and type of remedy ordered by the Court because the petitioner, though absent during the proceeding before the Court of Appeals is required to abide by that Court's order and incur considerable financial detriment.

b. This Interest Is Adversely Affected by Disposition of the Proceeding.

Unless the petitioner may intervene in this proceeding, even after the Appellate Court has issued its decision and judgment, he may not appeal that decision and judgment and thereby protect his interests by advancing his position concerning them. Unless the petitioner has a right to intervene, therefore, significant rights and interests are irretrievably lost.

c. The Petitioner's Interest Is Not Adequately Represented by the Labor Board.

In *U. A. W.* v. *Scofield, supra,* and *Trbovich* v. *Mine Workers, supra,* this Court recognized that an agency with a duty to enforce both public and private rights may injure the latter while pursuing the former and that consequently private parties have a right to intervene in review or administrative proceedings to protect vital private interests. The rationale of *Scofield* and *Trbovich* is applicable to this case.

The Labor Board, in August, 1973, petitioned for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. However, the Labor Board contends that it has discretion in fashioning remedial orders and that it has a right in appropriate cases to require that unsuccessful charged parties reimburse the charging party for litigation and/or organizational expenses.[21] While the Board is seeking *certiorari* in order to preserve its statutory discretion, and, if permitted, will argue the case on that basis, the petitioner here claims

21. Tiidee Products, Inc., 194 NLRB 1234.

that the Board has no discretion and no statutory authority to require an unsuccessful charged party to reimburse the charging party for the latter's litigation or organizational costs. Consequently, in any subsequent appellate proceeding, the arguments advanced by the Board will differ from those advanced by the petitioner as the Board and the petitioner pursue their separate interests. Clearly, then, the petitioner has demonstrated that governmental representation of his interests "may be" inadequate because the Labor Board pursuing its position may take a position adverse to petitioner's judicially recognized private interests. Because the policies expressed by Rule 24(a) Federal Rules of Civil Procedure may be applied to proceedings in a circuit court of appeals, it is clear that the petitioner has a right to intervene in the proceeding before the Circuit Court in the instant case. This right may be defeated only if the application for intervention is untimely. Petitioner contends that its application is timely and it is to this contention that we now turn.

d. Petitioner's Application to Intervene Is Timely Though It Occurred After the Circuit Court of Appeals Issued Its Decision.

Consistent with the liberal requirements of intervention discussed above, in situations, such as here, in which intervention is of right, and the applicant would be seriously harmed if he is not permitted to intervene, "courts should be reluctant to dismiss a request for intervention as untimely. . . ."[22] Petitioner, alone, is in a position to protect his legally recognized private interests and to seek relief from the extraordinary penalty imposed upon him by the Appellate Court,—the requirement that he pay to the union its litigation and organizational costs. The union, of course, will not represent the pe-

22. Wright and Miller, *Federal Practice and Procedure*, Section 1916 at page 573, 1972.

titioner's interests in any subsequent appellate proceedings nor will the Labor Board whose interests, as stated, differ from those of the petitioner. Because the petitioner is most directly affected by the judgment of the court of appeals, petitioner must have an opportunity to argue in defense of his own interests and to urge that the Labor Board does not have the statutory right to impose upon the petitioner the requirement that he pay litigation and organizational costs to the union, and that the Appellate Courts have no authority to enlarge the Board's remedial order. Consequently, the petitioner should be granted intervention as of right with his application to intervene being considered timely though it occurred after the decision of the appellate court. As the Fifth Circuit has recently pointed out:

> " 'Timeliness' is not a word of exactitude or of precisely measurable dimensions. The requirement of timeliness must have accommodating flexibility both toward the court and the litigants if it is to be successfully employed to regulate intervention in the interest of justice." 8. *McDonald* v. *E. J. Lavino Co. supra* at 1074.[23]

The recognition of the Petitioner's right to intervene is particularly significant where, as here, only the Petitioner will present and argue the important issue of whether the Board possesses the power to grant collateral or punitive relief and only the Petitioner can protect his interests by presenting and arguing the issue of whether the court below exceeded its authority by enlarging the remedy chosen by the Board, in as much as the interests of the Board differ from those of the Petitioner. It is to these issues that the Petitioner now turns.

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23. Indeed, it was only after the decision of the appellate court that petitioner's private interests were seriously and adversely affected. The Labor Board's amended order which preceded the appellate court's decision did not require the petitioner to pay litigation and organizational expenses. Only after the appellate court wrongly expanded the Board's order was the petitioner required to bear this financial responsibility. Unless he is permitted to intervene, his right to protect his private interests and to urge that this financial ability was wrongly imposed will be irretrievably lost.

II.

THE BOARD DOES NOT POSSESS POWER TO ASSESS COLLATERAL OR PUNITIVE RELIEF AND THE COURT BELOW EXCEEDED ITS AUTHORITY BY ENLARGING THE REMEDIES CHOSEN BY THE BOARD.

A. The Board Does Not Possess Power to Assess Collateral or Punitive Relief.

The Board has no power to issue either "compensitory monetary" or "punitive" orders. *Local 60, U. S. of C. & J.* v. *N. L. R. B.*, 365 U. S. 651, 655 (1961); *Tiidee Products, Inc.*, 194 NLRB 1234; *U. S.* v. *Russell*, 356 U. S. 634, 646 (1958). As an administrative agency, the Board may exercise only those powers which the legislature has delegated to it.[24] An analysis of legislative history indicates that Congress in considering both the Wagner and Taft-Hartley Acts concluded that a damage remedy was inappropriate to Board proceedings.[25]

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24. *H. K. Porter* v. *N. L. R. B.*, 397 U. S. 99 (1970) 1-Am. Jur. 2nd Administrative Law, Section 72. Therefore, damages for "medical expenses, pain and suffering and property damages" may not be awarded by the Board even though proximately caused by the statutory violation. *U. S.* v. *Russell, supra* at 646. In *Operating Engineers, Local 513*, 145 NLRB 554 (1963), employees were not allowed to recover back pay for time lost from work due to being physically assaulted by union agents. Similarly, in *St. Clair* v. *Teamsters, Local 515*, 442 F. 2d 128 (CA 6, 1969) the Board did not have the power to remedy collateral injuries, such as the loss of a home due to inability to make mortgage payments.

25. Senator Taft, in considering a proposal that would allow the Board to assess damages for breach of bargaining agreements or in cases involving secondary boycotts, stated that there existed "no possibility of a suit for damages" under the Board's present powers. 93 Cong. Rec. 4858 (1947). In spite of early attempts to permit the Board to order parties who committed unfair labor practices to pay damages or to make restitution, the final version of the Taft-Hartley Act authorized the Board only ". . . to take such affirmative action, including reinstatement with or without back pay as will effectuate the policies of the Act." (S. 2926, 73rd Cong., 2nd Sess, 1 Leg. Hist. of the Taft-Hartley Act, pp. 6-7, 1 Leg. Hist. 2465, S. 1958, II Leg. Hist. 2292; H. R. 7978, as reported 2nd House Print. II Leg. Hist. 2905; H. Cong. Rep. No. S10 at 54, 80th Cong., 1st Sess., II Leg. Hist. 2931; 93 Cong. Rec. 4858 (1947).

Congress has been aware of repeated or pattern violators but has not permitted the Board to assess punitive relief. Because Congress has permitted some administrative agencies to possess such powers,[26] it may be presumed that if Congress had intended the Board to possess such powers it would have expressly granted them. Accordingly, it is clear from an analysis of the Legislative History and the relevant judicial interpretations that the Board does not have the power to assess punitive relief. Consequently, the Board does not have the power to require a party which it finds guilty of committing an unfair labor practice to pay the litigation and/or organizational expenses of other parties in the unfair labor practice proceeding.

B. The Court Below Exceeded Its Authority by Enlarging the Remedies Chosen by the Board.

Because the Board has been charged by Congress pursuant to Section 10(c) of the National Labor Relations Act to select remedies to effectuate that Act and because the Board in fashioning remedies utilizes its expertise, its choice of remedy must be given great deference by reviewing courts, unless it can be shown that the Board's remedy is a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric and Power Co.* v. *National Labor Relations Board,* 319 U. S. 533, 540. Because the court below did not demonstrate that the remedy

26. See, e.g., the Securities Act of 1933 levying fees where the suit or defense is "without merit," 15 U. S. C. Sec. 77k(e) (1964); Clayton Act, Sec. 4, 15 U. S. C. Sec. 15; Communications Act of 1934; Sec. 206, 47 U. S. C. Sec. 20; Copyright Act, 17 U. S. C. Sec. 116; Interstate Commerce Act, Sec. 16, 49 U. S. C. Sec. 16(2); Packers and Stockyards Act, Sec. 309(f), 7 U. S. C. Sec. 210(f); Perishable Agricultural Commodities Act, Sec. 7(b), 7 U. S. C. Sec. 499(b); Securities Act of 1933, Sec. 11(e), 15 U. S. C. 77k(e); Securities Exchange Act of 1934, Secs. 9(e), 18(a), 16 U. S. C. Sec. 77k(e); Securities Exchange Act of 1934, Sec. 99(e), 18(a), 15 U. S. C. Secs. 78i(e), 78r(a); Servicemen's Readjustment Act, 38 U. S. C. Sec. 1822(b); and Trust Indenture Act, Secs. 323(a), 53 Stat. 1176, 15 U. S. C. Sec. 77www(a).

selected by the Board in its amended order was a patent abuse of discretion or was calculated to achieve ends other than those which can be said to effectuate the policies of the Act, the court by substituting its judgment for that of the Board exceeded its powers and acted incompatibly with the orderly function of the process of judicial review. Because any person aggrieved by a Board order "denying in whole or in part the relief sought" may obtain review in the District of Columbia Circuit pursuant to Section 10(f) of the Labor Act, 29 U. S. C. 160(f), the tendency of the court below to exceed its authority by enlarging the remedy chosen by the Board will produce a great number of cases in that circuit challenging the Board's refusal to grant extraordinary relief. Review by this court, therefore, is necessary not only to prevent the Board from exceeding its statutory powers in fashioning relief but also to prevent a reviewing court from exceeding its authority by enlarging upon the remedial orders of the Labor Board.

In addition, this Court should grant review in order to protect and define the rights of parties who are respondent to the Board's administrative proceedings, who do not appeal the Board's decision to the reviewing court, but who, nonetheless, are adversely affected by the *reviewing court's decision* when that court enlarges the remedy selected by the Board.

III.

A PERSON, NOT PRESENT DURING THE COURT'S PROCEEDINGS BUT WHO WILL BE ADVERSELY AFFECTED BY THE APPELLATE COURT'S DECISION TO ENLARGE OR MODIFY THE BOARD'S REMEDIAL ORDER MUST BE GIVEN OFFICIAL NOTICE OF THE COURT'S CONTEMPLATED DECISION AND ALLOWED AN OPPORTUNITY TO PRESENT HIS VIEWS BEFORE THE COURT'S DECISION BECOMES EFFECTIVE.

Whether viewed as intervention as of right or as due process, a person not present during the court's proceedings, but who will be aggrieved when the appellate court enlarges or modifies the Board's order must be accorded "party status," given official notice of the court's contemplated decision, and permitted to argue its position, before the court's decision becomes effective. A person who will be aggrieved when the appellate court enlarges or modifies the Board's order has as much or more interest in the appellate court proceedings as does the party requesting modification or enlargement of that order. His right to appeal to this Court from an order that adversely affects his interest or to seek a rehearing from the appellate court will be forever foreclosed unless he is permitted standing to participate as a party in the appellate court proceeding whether under the principles of intervention by right or pursuant to the requirements of due process.

IV.

IF THIS COURT DENIES THE RIGHT OF THE PETITIONER TO INTERVENE IN THE PROCEEDINGS BEFORE THE CIRCUIT COURT OF APPEALS, PETITIONER SEEKS, AS AN ALTERNATIVE, DIRECT APPELLATE INTERVENTION BEFORE THIS COURT BASED UPON ITS SUBSTANTIAL INTEREST IN THE OUTCOME OF THIS PROCEEDING.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. .....

HECK'S, INC.,

Petitioner,

vs.

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Respondents.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Respondent.

MOTION TO INTERVENE.

Heck's, Inc. by its attorneys hereby moves to intervene in the above proceedings in support whereof, the following is shown:

1. Heck's is the employer in the instant case and was the respondent in the proceedings before the National Labor Relations Board which gave rise to this case. By its decision on March 21, 1973, the Appellate Court for the District of Columbia Circuit granted relief additional to that which was provided by the Labor Board—the imposition of litigation and organizational expenses. These expenses will be assessed directly against Heck's.

2. Absent intervention, Heck's will be unable to protect its vital interests and make relevant arguments including, *inter alia* the arguments that the Board has no statutory authority to grant collateral or punitive relief and that the Appellate Court exceeds its authority when it enlarges the Board's remedial order.

Wherefore Heck's respectfully files this motion for intervention.

Respectfully submitted,

. . . . . .

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Precedent for this Court's authority to permit *direct intervention*, regardless of whether it permits the petitioner to intervene in the proceedings before the Circuit Court of Appeals, is found in recent Supreme Court decisions which have permitted parties to participate in judicial proceedings in order to protect their legally recognized rights and interests.[1] As stated in part I, a party must be granted intervention as of right at *any stage* of a proceeding even after a court's final decree, if intervention is necessary to obtain review of an erroneous disposition of its vital interests. Here, the Appellate Court, in effect, ruled against the petitioner's vital interests and, at the same time, denied it an opportunity to intervene to contest the ruling. Therefore, it is proper for the petitioner to directly intervene in proceedings before this Court, if this Court grants the Labor Board's petition for a writ of certiorari.[2]

Because the arguments in support of Heck's petition for writ of certiorari will be identical to those in support of its Motion to Intervene, Heck's requests that this document be considered not only a petition for a writ of certiorari but also, in the alternative, a brief in support of its motion to directly intervene in proceedings before this Court.

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1. *Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150 (1970); *Barlow* v. *Collins*, 397 U. S. 159 (1970); and Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450 (1970).

2. This Court recognized that it may grant intervention on motion to a party who had not participated in the proceedings before the Court of Appeals. *N. L. R. B.* v. *Acme Industrial Co.*, 385 U. S. 432 (1966).

CONCLUSION.

The petition for writ of certiorari should be granted or, in the alternative, this Court should grant the petitioner's motion to intervene in proceedings before this court.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit.

No. 71-1550

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347
AMALGAMATED MEAT CUTTERS,

and

BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REVIEW OF ORDER OF NATIONAL LABOR RELATIONS BOARD.

Decided March 21, 1973.

Before BAZELON, *Chief Judge*, and MCGOWAN and LEVENTHAL, *Circuit Judges*.

Opinion for the Court filed by MCGOWAN, *Circuit Judge*.

MCGOWAN, *Circuit Judge:* In this direct review proceeding under the National Labor Relations Act, we are concerned only with remedies. The wrongs—consisting of Section 8(a)(1) and (5) violations—were before us in *Food Stores Employees Union, Local 347* v. *NLRB*, 433 F. 2d 541 (1970). We there

granted enforcement of the Board's order, but, in response to the Union's contention that the Board should have gone further in providing adequate relief, we remanded the case to the Board for reconsideration of the Union's requests in this regard. Although the Board has increased somewhat the range of the relief granted by it initially, the Union has renewed its complaint to this court that the Board has fallen short of proper effectuation of the policies of the Act. To the limited extent hereinafter indicated, we find this to be true; and we enlarge the remedies accordingly.

I.

The employing company, Heck's Incorporated, is not a stranger to the processes of the Board. Operating a chain of discount stores in the Southeast, this is the eleventh time that its resistance of union organization has embroiled it in Board proceedings.[1] In none has it prevailed at the Board level, and its fortunes in the Courts of Appeals have been only marginally better.[2] In its first opinion in this case, the Board characterized

1. The long history of this struggle is as follows: Heck's Discount Store, 150 NLRB 1565 (1965), *enforced per curiam*, 369 F. 2d 370 (6th Cir. 1966); Heck's Inc., 156 NLRB 760 (1966), *enforced as modified*, 386 F. 2d 317 (4th Cir. 1968); Heck's Inc., 158 NLRB 121, *enforced per curiam*, 387 F. 2d 65 (4th Cir. 1967); Heck's Inc., 159 NLRB 1151 and 159 NLRB 1331 (1966), *consent decree entered* (4th Cir. No. 11,390 June 13, 1967); Heck's Inc., 166 NLRB 186 and 166 NLRB 674 (1967), *enforced as modified*, 390 F. 2d 655 (4th Cir. 1968) and 398 F. 2d 337 (4th Cir. 1968), *modified and remanded sub. nom. NLRB* v. *Gissel Packing Co.*, 395 U. S. 575 (1969); *Heck's Inc.*, 170 NLRB 178 (1968), *enforced in part, remanded in part in light of NLRB* v. *Gissel Packing Co., supra*, 418 F. 2d 1177 (D. C. Cir. 1969); Heck's Inc., 171 NLRB 777 (1969); Heck's Inc., 172 NLRB No. 255 (1969) *enforced in part, remanded in part*, 433 F. 2d 541 (D. C. Cir. 1970); Heck's Inc., 174 NLRB 951 (1971).

2. The Fourth Circuit refused to enforce an 8(a)(5) order to bargain in *NLRB* v. *Heck's Inc.*, 386 F. 2d 317 (4th Cir. 1967), on the ground that the card majority had been obtained through improper participation of supervisory personnel. In *N. L. R. B.* v. *Heck's Inc.*, 398 F. 2d 337 (4th Cir. 1968), the court declined enforcement of an order to bargain, but that decision was reversed by the Supreme

Heck's as having "a labor policy in all its stores that is opposed to the policies of the Act." In its Supplemental Decision following upon our remand, the Board asserts that "it is by now clear that [Heck's] conduct here is but a part of a pattern of unlawful antiunion conduct engaged in by [Heck's] top officials throughout [its] entire operations for the purpose of denying to all of its employees the exercise of those rights guaranteed the employees by Section 7 of the Act;" and, viewing Heck's conduct not "in isolation" but "in the total context," the Board characterized Heck's unfair labor practices as "clearly aggravated and pervasive."

The unfair labor practices involved in this case grew out of the Union's effort to organize the employees of Heck's store in Clarksburg, West Virginia. The 8(a)(1) violation was found by the Board to reside in unlawful questioning and threatening of employees, and management polling by nonsecret ballot to ascertain the degree of employee support for the Union. The 8(a)(5) dereliction consisted of a refusal to bargain despite the existence of cards showing a majority in favor of the Union. The remedies initially afforded by the Board included a bargaining order, and the conventional command that the employer cease and desist from interfering with Section 7 rights. Appropriate notices of the relief given were directed to be posted at all of Heck's stores.

The Union's requests for additional relief at issue on the remand were as follows:

> 1. A copy of the notices ordered to be posted should also be sent to the home of each Heck's employee, and the president and vice-president of Heck's should be required to read the notices to employees at all Heck's locations.

Court *sub. nom. N. L. R. B.* v. *Gissel Packing Co.*, 395 U. S. 575 (1969). This court, while enforcing the Board's order in part in Food Store Emp. U., Loc. 347, *Amal. Meat Cut.* v. *NLRB*, 418 F. 2d 1177 (1969), remanded, in light of *Gissel*, for further findings as to whether the employer's refusal to bargain was accompanied by independent unfair labor practices which precluded a fair election.

2. To facilitate Union access to employees, Heck's should (a) provide the union with a list of names and addresses of all its employees; (b) afford the Union access to company bulletin boards and other posting places; (c) permit Union use of employer facilities in non-working parts of the stores during non-working hours; and (d) permit the Union to call a meeting in each store on company time in facilities customarily used for employee meetings.

3. Heck's should be ordered to bargain with the Union on a company-wide basis, *i.e.*, the Board should recognize a bargaining unit encompassing all the stores in the Heck's chain.

4. The General Counsel should be ordered to seek injunctions under § 10(j) of the Act whenever a complaint issues against Heck's.[3]

5. Heck's should be ordered to reimburse employees for the loss of wages and fringe benefits that would have obtained if it had not flagrantly violated § 8(a)(5) by refusing to bargain about a contract.

6. Heck's should be ordered (a) to pay the Union the amount of dues and fees which would have been paid by the employees of the Clarksburg store during the period of Heck's refusal to bargain; and (b) to compensate the Union for its litigation expenses, including reasonable attorney's fees, and for excess organization expenses caused by the unfair labor practices to which it was subjected.

The proceedings upon remand consisted of the receipt by the Board of statements of position from the General Counsel, the

3. In its Supplemental Decision, the Board at the outset noted that the Union requested this particular relief and the General Counsel opposed it, and thereafter made no further reference to the matter. Similarly, there was no discussion of this item by either the Union or the Board in their briefs and arguments before us. In these circumstances we do not pursue the matter, except to remark that the General Counsel's statement on remand emphasizes his continuing sensitivity to the obligations imposed upon him by Section 10(j). He also pointed out that the final order to be entered by the Board in this case runs against Heck's, and cannot operate to impose obligations on the General Counsel. It may be that the matter was not pressed upon the Board in the light of these representations.

Union, and Heck's. After consideration of these statements, the Board issued a Supplemental Decision and Amended Order, which enlarged the remedies in the following respects:

> 1. The notices required to be posted at all of Heck's stores are also required to be mailed to each employee at his home.
>
> 2. The Union is to be afforded access for a one-year period to Heck's bulletin boards, and other places where notices to employees are customarily posted, for the posting of Union notices, bulletins, and other organizational literature.
>
> 3. The Union is to be furnished by Heck's with a list of all of its employees' names and addresses, such list to be kept current for a one-year period.

Dissatisfied with the degree to which the Board thus moved in the direction of meeting its requests, the Union petitioned for review in this court. The Board has responded in defense of its actions, but Heck's, although its position on remand was that no additional relief was in order, has not intervened and is not now before us.

II.

We turn first to the controversies that remain with respect to non-monetary relief. All of the additional relief given on remand was of that character, and it is now unchallenged. The Union does not appear to press its contention that the notices —now required to be mailed as well as posted—also be read by the company officers; and we do not, in any event, disturb this exercise of the Board's discretion. The union does complain of the failure to give it access to the employees on company property. The Board was of the view that this privilege was not demonstrably necessary to the effectiveness of the Union's organizing efforts, especially in the train of the Board's action in requiring that the Union be furnished with the list of employees' names and addresses. Until this latter expedient had been tried and found wanting, the Board thought that the

problems inevitably attendant upon Union activity on company property need not be anticipated. This is an exercise of judgment which we are not disposed to overturn.

The Union also persists in its assertion that the bargaining order, which presently embraces only the unit at the Clarksburg location, should be made company-wide. The Board, emphasizing that the Union's organizing campaign has been, as in the case of Clarksburg, conducted on a store-by-store basis, and that there is no claim that the Union represents a majority of all the employees or a majority in any location other than those presently covered by bargaining orders,[4] alludes to the novelty of this kind of relief, especially in the light of Section 7's explicit guarantee of the right of employees to refrain from representational bargaining.

Despite the unrelieved history of the omission of this device from the Board's remedial arsenal, the Board has purported to consider the proposal on its merits. Its conclusion was that the Union's very success in gaining majorities in a number of single locations indicates that its potential for successful organization elsewhere is substantial—a potential which, indeed, has been presumably increased by the enlarged relief currently being given. Under these circumstances, the Board thought it both unnecessary and unwise to risk trenching upon the policies of Section 7 in the absence of proof that the Union would be helpless without this extraordinary relief. These considerations seems to us rational in nature and well within the range

4. Neither do we disturb the Board's rejection of a related Union proposal, which was supported by the General Counsel, that the Board enter *now* a bargaining order with respect to any single-store unit as to which the Union *hereafter* secures a card majority or otherwise achieves bargaining rights. The Board, in addition to believing that this was not essential to the employees' ability in the future freely to choose their bargaining representatives, pointed out that disputes over representation issues would, under this approach, presumably have to be decided by the courts of appeals acting with the aid of special masters—a circumstance that promises neither greater expedition in handling nor more expert resolution in result. We have no warrant to fault the Board for taking these considerations into decisive account.

of respect traditionally to be accorded by us to the Board's determinations.[5]

III.

The remaining components of the Union's prayer for additional relief involve monetary compensation. They are four in number.

1. *Legal Fees and Litigation Expenses.*

It is the Union's submission that, where it is necessary to exhaust legal procedures in order to attain rights accorded it by the Act, it should be reimbursed for its counsel fees and other litigation expenses, at least in respect of an employer who, like Heck's has been found by the Board to have engaged in a deliberate "pattern of unlawful antiunion conduct." The Board, however, stressed the fact that the Act assigns the laboring oar to the General Counsel in the prosecution of an unfair labor practice charge, and that the participation of the charging party is not central to the public purposes of the statute but, rather, incidental to that party's efforts to assure protection of its own private interests. With this statutory framework, said the Board, "the public interest in allowing the Charging Party to recover the costs of its participation in this litigation does not override the general and well-established principle that litigation expenses are ordinarily not recoverable."

There are, it seems to us, obvious difficulties with this approach, certainly in the case of an employer who appears to look upon litigation as a convenient means of delaying—and thereby perhaps avoiding—the fatal day of union recognition and collective bargaining. We need not pursue those difficulties in detail, however, for the reason that the Board itself has subsequently de-

5. *N. L. R. B.* v. *Gissel Packing Co.*, 395 U. S. 575, 612 n. 32 (1969); *Fibreboard Paper Products Corp.* v. *N. L. R. B.*, 379 U. S. 203, 216 (1964); *International Union of Electrical Workers* v. *N. L. R. B.*, 426 F. 2d 1243, 1250 (D. C. Cir. 1970), *cert. denied*, 400 U. S. 950.

parted from the rationale upon which its refusal of litigation expenses in this case is based. In its Supplemental Decision and Order, 194 NLRB No. 198, issued after remand by this court in *International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *NLRB* (Tiidee Products, Inc.), 426 F. 2d 1243 (1970), *cert. denied,* 400 U. S. 950 (1970), the Board ordered the additional relief of payment to both the labor organization and the Board of their litigation expenses in both the Board and court proceedings.

In doing so the Board reasoned that the Congressional objective of achieving industrial peace through collective bargaining "can only be effected when speedy access to uncrowded Board and court dockets is available." It went on to conclude that, "in order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest we find that it would be just and proper" to order reimbursement of both the Board and the Union for their expenses incurred in the investigation, preparation, presentation, and conduct of the cases before it and in this court.[6]

We think the considerations which motivated the Board to give this enlarged relief in *Tiidee* are also operative here. Although the Board in its Supplemental Decision in this case has nowhere characterized the litigation as frivolous, it has used the language of "clearly aggravated and pervasive" misconduct; and in its original opinion it questioned Heck's good faith because of its "flagrant repetition of conduct previously found unlawful" at other Heck's stores. It would appear that the Board has now recognized that employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board. We

6. These reimbursable expenses were described by the Board as "reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses."

hold that the case before us is an appropriate one for according such relief.

2. *Organizing Costs.*

In its Supplemental Decision after remand, the Board lumped litigation expenses and excess organizational costs together in its discussion. It prefaced that discussion by saying that ". . . we are not unmindful of the probability that the Charging Party has spent more money on organizational costs and attorneys' fees than it would have spent had [Heck's] not refused to bargain."[7] It concluded, however, not to make any allowances in this regard for the reasons articulated by it in denying litigation expenses. This rationale, as we have seen, generally turned upon what the Board considered to be the subordinate role of a charging party in the scheme of the Act.

As in the case of litigation expenses, the Board, upon remand in *Tiidee*, has shifted its ground with respect to organizational costs. In its Supplemental Decision in *Tiidee*, the Board did not allow the claim for excess organizational expenses, but it justified that action solely on the ground that ". . . the Union was selected by the employees after a 2-month campaign at the first election held;" and, because of this circumstance, the Board found ". . . no nexus between Respondent's unlawful conduct here under examination and the Union's preelection organizational expenses . . ." Thus, in *Tiidee* the Board appears to have denied organizational costs because it believed that, on the facts of that case, no unusual organizational costs had been incurred.

This obviously is quite a different thing from saying that the policies of the Act forbid the allowance of such costs in cases

7. In his statement of position on remand, the General Counsel supported the Union's entitlement to extraordinary organizational costs. His comment was that where the Union was required by Heck's unfair labor practices "to expend additional funds in organizational activity over and above those normally required . . . [Heck's] should be ordered to reimburse the Union for these additional expenditures."

like the one before us, where the Board has in terms indicated its awareness of "the probability" that such costs were experienced by reason of Heck's intransigence. Under these circumstances we find nothing in the Board's Supplemental Decision which constitutes an adequate justification for the denial of extraordinary organizational costs to which the Union was exposed by reason of Heck's policy of resisting organizational efforts and refusing to bargain; and we think that provision for such costs should have been included in the remedies fashioned by the Board on remand.[8]

3. *Union Dues and Fees.*

In its Supplemental Decision dealing with the Union's claim that it should be reimbursed for union dues and fees lost by it during the period when Heck's was refusing to bargain, the Board asserts that the only predicate for such relief would be a finding by it that, had there been bargaining, it would have resulted in the inclusion of a union security clause which would have required payment of dues and fees as a condition of continued employment. The Board concludes that "[W]hile the execution of such an agreement is of course a possibility, we cannot conclude that it is so strong a probability that any loss of dues or fees must be deemed to have resulted from [Heck's] unlawful refusal to bargain."[9]

8. Counsel for the Board in their brief in this court attempt to supply a number of reasons why excess organizational costs should not be taken into account, such as their assertedly speculative nature and their invitation of collateral litigation which burdens the Board's administration of the Act. These are counsel's reasons, not the Board's; and, under familiar principles of judicial review of administrative agencies, we appraise the Board's actions only in terms of the latter.

9. The Board raised, although it pretermitted, a question as to its power to provide a remedy in respect of union dues and fees, because of the restrictions on payments by employers to employee representatives imposed by Section 302 of the Act. Because of the dispositon we make of this claim we need not pursue this issue of authority, although it would appear that Section 302 is addressed to other circumstances than those involved here.

The Union, in challenging this conclusion, argues alternatively that (1) the likelihood of the successful negotiation of a union security clause is substantial in the light of the prevalence of such clauses in collective bargaining agreements, or (2) even if it be assumed that no such contract would have ensued, the willingness of Heck's to bargain at all would have resulted in the voluntary payment of union fees and dues by at least some of the 26 employees who signed the authorization cards.

We have difficulty with each of these hypotheses. It is undoubtedly true that union security clauses have attained a wide degree of use, but it also remains true that an employer may bargain to impasse with respect to such a demand, and that the Board may not impose that obligation upon the employer. *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99 (1970). We also think it speculative in the extreme to suppose that employees would voluntarily begin paying initiation fees and dues to a union which has been denied recognition and failed to produce a contract. There is nothing in the record to show—and the Union does not represent to us—that it made any effort to assess dues and fees during the period of its travail with Heck's In the absence of such evidence, there is some reason to suppose that union policy, generally and in the case of the Union here involved, is not to make any effort to collect dues and fees, at least in the case of newly organized employees, until the fruits of union membership are brought home in the form of a signed agreement.[10]

10. In its rejection of a claim of this kind on remand in *Tiidee*, the Board noted that the labor organization involved in that case had asserted that ". . . because it is union policy not to collect initiation fees and dues until a contract is executed, it has received nothing from the unit employees throughout the course of this proceeding . . ." The Board purported first to view this claim as "partaking of a request for a make-whole remedy, which we have declined to order, since presumably the dues and fees sought would have come from lost wages . . ." Although it may be that the Board here is confusing the substantive merits of a make-whole remedy with the wholly manageable problem of preventing a double recovery, the Board went on to conclude that, since the union as a matter of

It would, in any event, present formidable problems of proof to try to determine at this late date which employees would, if they had been asked, have paid fees and dues during the period in question. Short of assuming that all would have done so—an assumption for which there seems little foundation in the realities of human nature—the inquiry would be an exercise in futility. In any event, the loss, if any, of such dues and fees will, we think, be offset to some extent by the relief we have directed in respect of extraordinary organizational costs.[10a]

4. *Compensation for Lost Benefits.*

The additional remedy of making its members whole for the wage and other fringe benefits which might have accrued from the bargaining process is the matter principally pressed by the Union. In its Supplemental Decision, the Board initially reiterated its position, stated in *Ex-Cell-O Corporation*, 185 NLRB No. 20, that it was wholly lacking in statutory authority to give relief of this nature. However, it went on to conclude that, even if it had the power to act, this would not be an appropriate case in which to do so. It pointed to the opinions of this court subsequent to *Tiidee* in which we have held the make-whole remedy inapplicable where the refusals to bargain rested on "debatable" issues, as contrasted with those which

policy did not seek initiation fees and dues prior to negotiation of a contract, it saw no reason to cause the employer to assume the risk of that passivity.

10a. In *Bangor & Aroostock R. Co.* v. *BLFE*, 442 F. 2d 812 (1971), this court held that dues and fees could be recovered by a union as damages in respect of improper job abolitions. A union shop clause in the collective bargaining agreement there involved made it plain that, but for the employer's action, dues and fees would have been paid. The uncertainty claimed was whether men hired to fill the positions would have joined the plaintiff union rather than its competitor. The court there thought that the evidence supported a reasonable inference that they would, thereby justifying the placing of the burden of proof as to the uncertainty on the employer. In the case before us, union policy would have resulted in no receipt of dues and fees even during an unduly prolonged bargaining period.

we, as in *Tiidee*, have characterized as "patently frivolous."[11] Referring to the precise circumstances of this case, the Board concluded that the latter category did not embrace a defense which failed solely by reason of the credibility determinations of the Trial Examiner.

The union, although harassed from the beginning of its organizing campaign at the Clarksburg store, within a few days represented to Heck's that it had in hand the signed authorization cards of a majority of the employees; and it requested recognition and bargaining. The response of Heck's was to file a petition for an election. When the election was held some six weeks later, the Union lost by a vote of 16 to 19, although this result was subsequently nullified by reason of the employer's unfair labor practices. The Trial Examiner found that the General Counsel had failed to prove that Heck's lacked a good faith doubt of the Union's majority status and that, accordingly, there was no 8(a)(5) violation.

In making this determination, the Trial Examiner focused first on the substance of Heck's refusal to recognize the Union on the basis of the cards. The administrative hearing record shows that Heck's introduced testimony by certain employees as to intimidation and other circumstances which, if it had been believed, would have eliminated enough cards to vitiate the

11. *International Union, UAW* v. *NLRB (Ex-Cell-O Corporation)*, 449 F. 2d 1046, 449 F. 2d 1058 (1971); *Steelworkers* v. *NLRB (Quality Rubber Mfg. Co.)*, 430 F. 2d 519 (1970); *Amalgamated Clothing Workers* v. *NLRB (Levi Strauss & Co.)*, 441 F. 2d 1027 (1970).

In *Ex-Cell-O*, the union requested and won the election, but the employer refused recognition on the basis of union activity which allegedly precluded a fair election. In *Quality Rubber*, the employer refused recognition on the basis of cards, but did not seek an election. The result turned on issues of credibility which, although resolved against the employer, were found to be consistent with good faith. In *Levi Strauss & Co.*, the union requested an election after the employer refused recognition on the basis of cards. The union lost, but the employer was ordered to bargain because it was found to have engaged in unfair labor practices during the period preceding the election. Again the resolution turned on conflicting testimony.

majority status claimed by the Union. Although the Trial Examiner ultimately found each of the cards to have been validly obtained, he noted that the determination turned upon some close questions concerning the credibility of witnesses. The Trial Examiner also emphasized the fact that Heck's had promptly filed an election petition after the demand was made, and that Heck's had had some prior experience with card-based bargaining demands from the Union which later proved unwarranted.[12]

The Board took its stand principally upon what it termed to be the long history of disregard by Heck's generally of its obligations under the Act. Thus the Board's finding of bad faith was based not on a determination that Heck's objections to this particular demand for recognition were insubstantial, but rather on Heck's repetition in the period preceding the election of conduct found in prior proceedings to have been illegal. We agree with the Board's conclusion that an employer's good faith must be judged in the entire context of its behavior, and indeed our determination that some additional remedies are required in this case is based on Heck's consistent and repeated demonstration of antiunion animus. However, the factors which influenced the Trial Examiner on the issue of good faith remain undisturbed by the Borad's decision and are relevant to the appropriateness of the make-whole remedy.

In the light of these circumstances, we are not inclined to say that the Board's treatment of this issue on remand is beyond the wide range of latitude traditionally accorded the Board in the matter of remedies. The Supreme Court, although ultimately accepting the signed card approach in *Gissel* as a basis for creating the recognition and bargaining obligation, did at the same time refer to cards as "admittedly inferior to the election process." The employer here appears to have had some basis for questioning the result of the card approach, and it exhibited

12. Heck's Inc., 159 NLRB 1151, 159 NLRB 1331, *consent decree entered* (No. 11,390, 4th Cir. June 13, 1967); *N. L. R. B.* v. *Heck's Inc.*, 386 F. 2d 317 (4th Cir. 1968).

its readiness to invoke the election process. We do not, accordingly, revise the Board's failure to provide an additional remedy in the form of a make-whole provision.[13]

We grant enforcement of the Board's Amended Order, as the same shall be further enlarged upon remand by the inclusion of the additional remedies of litigation costs and organizational expenses discussed hereinabove.

It is so ordered.

13. The Board is equipped with a broad arsenal of remedies which it may employ in the case of a persistent violator. Rather than require application of such remedies on an all-or-nothing basis, it seems to us preferable to preserve sufficient flexibility to adjust the relief granted to the particular facts of each case. There are, as in everything else, degrees of flagrancy—and variations in its pattern.

APPENDIX B.

[Received April 2, 1973, Hugh E. Kline, Clerk]

[Filed April 26, 1973, Hugh E. Kline, Clerk]

United States Court of Appeals for the District of Columbia Circuit

No. 71-1530

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

JUDGMENT.

Before BAZELON, Chief Judge and McGOWAN and LEVANTHAL, Circuit Judges

This cause came on to be heard upon a petition of Food Store Employees Union, Local 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO to review an amended order of the National Labor Relations Board dated July 1, 1971, against Heck's Inc., its officers, agents, successors and assigns. The Court heard argument of respective counsel on April 17, 1973, and has considered the briefs and transcript of record filed in this case. On March 21, 1973, the Court, being fully advised in the premises handed down its opinion granting enforcement of the Board's amended order as modified. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Heck's, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning their union membership, sympathies, or activities.

(b) Threatening employees that choice of a union as their collective-bargaining representative would lead to the closing of the store.

(c) Illegally polling employees in a nonsecret ballot election to ascertain which employees support Amalgamated Meat Cutters and Butcher Workmen of North America, Food Store Employees Union, Local No. 347, AFL-CIO.

(d) Interviewing employees under coercive circumstances concerning matters relating to unfair labor practice charges and objections to an election.

(e) Refusing to bargain with Amalgamated Meat Cutters and Butcher Workmen of North America, Food Store Employees Union, Local No. 347, AFL-CIO, as the exclusive representative of its employees in the following appropriate unit:

> All employees of the Heck's, Inc. Clarksburg, West Virginia, store, excluding supervisors, guards, and professional employees.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of all the employees of Heck's, Inc. in the unit found to be appropriate and, if an agreement is reached, embody such understanding in a signed agreement.

(b) Post at each of its retail stores copies of the attached notice marked "Appendix," and mail a copy thereof to each of its employees. Copies of said notice, on forms provided by the Regional Director for Region 6, (Pittsburgh, Pennsylvania), after being duly signed by the representative of Heck's, Inc., shall be posted and mailed immediately upon receipt thereof,

and those posted shall be maintained by Heck's, Inc. for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Heck's Inc. to insure that said notices are not altered, defaced, or covered by any other material.

(c) Upon request of the Union, made within 1 month of the date of the Board's decision of July 1, 1971, immediately grant the Union and its representatives reasonable access for a 1-year period to its bulletin boards and all places where notices to employees are customarily posted.

(d) Upon request of the Union, made within 1 month of the date of the Board's decision of July 1, 1971, make available to the Union a list of names and addresses of all employees currently employed and keep such list current for a period of 1 year thereafter.

(e) Pay to the Union any extraordinary organizational costs which the Union incurred by reason of Heck's policy of resisting organizational efforts and refusing to bargain, such costs to be determined at the compliance stage of these proceedings.

(f) Pay to the Board and the Union the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of these cases before the National Labor Relations Board and the courts, such costs to be determined at the compliance stage of these proceedings.

(g) Notify the said Regional Director, in writing, within 20 days from the date of this Judgment, what steps Heck's, Inc., has taken to comply herewith.

David Bazelon,
Chief Judge, U. S. Court of Appeals for the District of Columbia Circuit.

Carl McGowan,
Chief Judge, U. S. Court of Appeals for the District of Columbia Circuit.

Harold Leventhal,
Circuit Judge, U. S. Court of Appeals for the District of Columbia Circuit.

APPENDIX.

NOTICE TO EMPLOYEES.

Posted pursuant to a judgment of the United States Court of Appeals enforcing as modified an order of the National Labor Relations Board, an agency of the United States Government.

After a trial in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law and has told us to post this notice about what we are committed to do.

All our employees have the right to self-organization to form, join, or assist labor unions, and to bargain collectively through representatives of their own choosing.

We will not threaten to close any store because our employees select a union to represent them, or question our employees concerning their union sympathies, or activities, or membership, or illegally poll employees in a nonsecret ballot, or interview employees under coercive circumstances.

We will not in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

We will recognize Amalgamated Meat Cutters and Butcher Workmen of North America, Food Store Employees Union, Local 347, AFL-CIO, as the bargaining representative of the employees in our Clarksburg, West Virginia, store. At the request of that Union we will bargain with it in good faith with respect to the terms and conditions of employment of the employees in that store, and we will embody in a signed contract any agreement reached.

We will mail a copy of this notice to all our employees.

We will grant the Union reasonable right to utilize our bulletin boards.

We will, upon request of the Union, immediately give to the Union a list of names and addresses of all our employees and we will keep the list current for a period of 1 year.

We will reimburse the Union for any extraordinary organizational costs it incurred as a result of the unfair labor practices found by the Board.

We will reimburse the Union and the National Labor Relations Board's General Counsel for their costs and expenses in connection with this proceeding.

All of our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named Union, or any other labor organization.

Heck's Inc.,
(*Employer.*)

Dated ..... By .....
(Representative) (Title)

A true copy:

Test: Hugh E. Kline, Clerk, United States Court of Appeals for the District of Columbia Circuit.

By: MARY WATERS,
Deputy Clerk.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1536 Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222, Telephone 412-644-2977.

APPENDIX C.

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD.

HECK'S, INC.

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AFL-CIO.

SUPPLEMENTAL DECISION AND AMENDED ORDER.

On September 24, 1968, the Board issued its Decision and Order in this case,[1] finding that the Respondent had engaged in various unfair labor practices, including a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act. The Board ordered the Respondent to bargain with the Union, but found no merit in the Charging Party's request for additional extraordinary remedies. Thereafter, on May 4, 1970, the Court of Appeals for the District of Columbia Circuit enforced the Board's Order[2] against the Respondent, but remanded the case to the Board for further consideration, in light of the court's decision in *Tiidee Products*,[3] of the Union's request for additional relief. The Board, having accepted the remand, issued a notice to the parties requesting statements of position. Such statements have

1. 172 NLRB No. 255.

2. *Food Store Employees Union, Local 347* v. *N. L. R. B.*, 433 F. 2d 541.

3. *International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *N. L. R. B.*, 426 F. 2d 1243 (C. A. D. C.).

been filed by the General Counsel, the Charging Party, and the Respondent.[4]

The Board has given full consideration to the views of the court of appeals, as expressed in its opinions in the instant case, the *Tiidee* case, and the Ex-Cell-O case.[5] The Board has also considered the parties' statements of position. For reasons more fully set forth hereinafter, the Board has concluded that it would effectuate the policies of the Act to give some but not all of the additional relief requested by the Union.

The Union seeks both monetary and nonmonetary relief. The monetary relief sought encompasses compensation for employees for loss of collective-bargaining benefits, and reimbursement of the Union for loss of dues and fees, for organizational costs, and for attorney's fees. The nonmonetary relief which it seeks includes the sending of notices to the homes of all employees at all the Company's locations; reading of the notices by Company President Haddad and Vice President Darnell to employees at all locations; granting the Union access to bulletin boards and other places where notices to employees are posted; granting union organizers access to store lounges, restaurants, and parking lots; granting the use of company facilities for a union meeting at each store on company time; giving the Union lists of the names and addresses of all the Respondent's employees; and either requiring the Respondent to bargain with the Union now in a companywide unit, or requiring the Respondent to bargain without further Board proceedings in any store unit in which the Union presents a card majority. The Union also seeks an order directing the General Counsel to seek an injunction under Section 10(j) of the Act whenever a complaint is issued against the Respondent.

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4. The Respondent filed a motion for oral argument and the Union filed a response in opposition to said motion. The request for oral argument is denied as, in our opinion, the record, including the parties' statements of position, adequately presents the issues and the positions of the parties.

5. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW* v. *N. L. R. B.*, 449 F. 2d 1046 (C. A. D. C., March 19, 1971) 449 F. 2d 1058 (C. A. D. C., June 9, 1971).

The General Counsel opposes reimbursement of employees for loss of collective-bargaining benefits, the award of attorney's fees, a companywide bargaining order, and an order directing him to seek injunctions under Section 10(j) of the Act. He took no position concerning reimbursement of the Union for the loss of dues and fees and with respect to the reading of notices to employees by company officials. He generally supported the Union's other requests for additional relief, although in some cases with certain reservations and qualifications.

The Respondent contends that no additional remedial provisions are warranted.

In the instant case, the Respondent violated Section 8(a)(1) of the Act by conduct which included threats, interrogations, coercive interviews, and illegal polls. The Respondent also unlawfully refused to bargain with the Union as the representative of its employees at this location in an appropriate unit. Respondent President Haddad and Vice President Darnell personally participated in some of the conduct which we and the court of appeals have found violated the Act.

Viewed in isolation, the Respondent's conduct as found in this case, although serious, is not so aggravated or pervasive as to warrant additional special remedies. However, as we have had occasion to point out, in a somewhat different context with respect to this Respondent,[6] it is by now clear that Respondent's conduct here is but part of a pattern of unlawful antiunion conduct engaged in by Respondent's top officials throughout Respondent's entire operations for the purpose of denying to all of its employees the exercise of those rights guaranteed the employees by Section 7 of the Act. In such circumstances conduct at a single store such as this can no longer be viewed in isolation; Respondent's conduct must, rather, be viewed in its total context. As so viewed, Respondent's unfair labor practices are clearly aggravated and pervasive. It is, accordingly, against this background of com-

6. See *Heck's, Inc.*, 172 NLRB No. 255.

panywide aggravated and pervasive unfair labor practices that we consider the Union's request for additional relief in this particular case.

1. Initially, we believe it appropriate to comment concerning the intended scope of our order with respect to the Respondent's violations of Section 8(a)(1). In his decision, which the Board adopted with respect to his findings of violations of Section 8(a)(1) of the Act, the Trial Examiner, in the light of Respondent's violations at various other stores in its chain, Respondent's posting at all of its stores of telegrams concerning the results of elections or polls at other stores, and the participation by Respondent's top officials in these unfair labor practices, concluded that the order should be broad enough to restrain future violations of Section 8(a)(1) at any and all of the Respondent's stores. Although the Board modified the Trial Examiner's findings and conclusions to the extent of finding an unlawful refusal to bargain that the Trial Examiner did not find, the Board did not in any respect disagree with the Trial Examiner's conclusions that the remedy for the 8(a)(1) violations should be company-wide. Indeed, the Board specifically adopted that portion of the Trial Examiner's order which required that the notices be posted at all of Respondent's stores. It is possible, however, that the inclusion at the beginning of the Board's Order of the store location at which these specific unfair labor practices occurred may have been interpreted as a *sub silentio* rejection of the Trial Examiner's recommendation with respect to the scope of the order. It was not so intended, and except as expressly limited therein, the order hereinafter entered shall apply to all of Respondent's employees and all of its operations wherever located.

2. With respect to the nonmonetary aspects of the requested additional relief, the basic function of an order remedying violations of Section 8(a)(1) is to assure to employees who, as here, have been subjected to interference, restraint, and

coercion by their Employer with respect to their right to select their own bargaining representative, that they have a protected right to engage in such activity, free from any fear of reprisal or other employer interference, restraint, or coercion. In the ordinary case, the posting of notices for a prescribed period is generally deemed sufficient to dispel the effects of the unlawful conduct. Here, however, upon reconsideration of this question in the light of all the factors involved, we conclude that the mere posting of notices by the Respondent at its operations is insufficient to dispel the lingering effects of its widespread and pervasive unlawful conduct. We believe, rather, that in order to dispel fully the effects of such unlawful conduct, it is necessary that the employees be able to read the notices fully and carefully, at their leisure, without fear that their interest in the contents of the notices will be noted by the Respondent and used against them; in addition, employees who are absent during the posting period should also have an opportunity to read the notices and be fully informed. This can best be accomplished by requiring that copies of the posted notices be mailed to each of the employees at his home.[7] In the circumstances here, the employees, in our opinion, can be adequately informed concerning the Government's protection of their Section 7 rights by the mailing and posting of the notices; we do not believe it necessary therefore, in this context, that the notices also be read to the assembled employees.

3. In addition, the full exercise by employees of their Section 7 rights requires that they be fully informed not only concerning those rights, but also concerning the advantages and disadvantages of selecting a particular labor organization, or any labor organization as their bargaining representative. The Respondent has ready day-to-day access to its employees, and has consistently used that access to minimize its employees'

7. *J. P. Stevens & Co., Inc.*, 171 NLRB No. 163, enfd. 417 F. 2d 533 (C. A. 5, 1969); *Marlene Industries Corp*, 166 NLRB 703, enfd. as modified 406 F. 2d 886 (C. A. 6, 1969); *Loray Corp.*, 184 NLRB No. 57.

opportunities to make an informed decision concerning collective-bargaining representation. In order that the employees may have free and ready access to information concerning all aspects of this question, we believe it is necessary in the circumstances that the Union be given reasonable access for a 1-year period to the Respondent's bulletin boards, and other places where notices to employees are customarily posted, for the posting of union notices, bulletins, and other organization literature.[8] We also conclude that in order to neutralize the effect of the Respondent's face-to-face restraint and coercion, it is necessary that the employees have ready access to union organizers and other officials who can explain to them the Union's point of view with respect to organizational activities.

Suggested methods of accomplishing this latter objective include requiring the Respondent to furnish the Union with a list of the names and addresses of its employees, requiring the Respondent to make company facilities available for employees meetings with union representatives, and requiring the Respondent to permit nonemployee union organizers to have access to employees in parking lots, store lounges, and other places where the Respondent's employees spend their time when not at work. We do not believe adoption of the two latter suggestions would be warranted unless, as is not established to be the case here, alternative means of access are clearly unavailable or have been tried and found wanting.[9] The requirement that the Respondent furnish the Union with lists of names and addresses of its employees will on the other hand facilitate contact between employees and union representatives without necessarily infringing upon the Respondent's right to control the use of its own property.[10] We conclude accordingly, that giving the Union access to the Respondent's bulletin boards, as aforesaid, and requiring that it be furnished with a list of the employees'

8. *J. P. Stevens & Co., Inc., supra.*

9. *N. L. R. B.* v. *Babcock & Wilcox Company*, 351 U. S. 105.

10. *J. P. Stevens & Co., supra.*

names and addresses, which list shall be kept current for a 1-year period, will insure that the employees have the opportunity to become fully informed, in an atmosphere free of interference, restraint or coercion, concerning all matters relevant to their choice of a bargaining representative.[11]

4. We have given full and careful consideration to the Union's request for a bargaining order broader than that previously entered herein, which is applicable only to the employee unit specifically involved in this case, and which has been enforced by the court of appeals. We are not persuaded that such a bargaining order is warranted in the circumstances here presented.

Initially, we note that there is no claim that the Union represents a majority of all the Respondent's employees, or that it represents a majority in any single-location unit other than those with respect to which bargaining orders are already outstanding. Consequently, by its basic position that the Board should enter a companywide bargaining order, the Union asks the Board to do something that it has never done throughout its history: to order bargaining with a union which has at no time established its majority status in the unit in which bargaining is requested.

The fact that a specific remedy has not heretofore been applied in a particular situation during the Board's more than 35-year history is not, of course, a reason for not applying it if it is otherwise warranted; it is, however, reason to examine carefully before applying it the legal and policy considerations bearing in its applicability. Although the Respondent's unfair labor practices have been widespread, aggravated, and pervasive, they have not in our opinion been so widespread, pervasive, or aggravated as to warrant such extraordinary relief as a com-

11. We deem such access to be as necessary to dispel the effects of the Respondent's conduct in those locations where the Union is the chosen representative, as in those locations where there is no representative.

panywide bargaining order not based on proof of majority. Indeed, the fact that the Union has been selected by a majority of the employees in a number of single-store appropriate units, including the unit involved in this proceeding, evidences the fact that the employees have not been wholly precluded from making their free choice. In these circumstances, and in view of the additional relief which we have granted to facilitate the ability of the employees to make a free and unfettered choice with respect to the representation question at locations where they are not now represented, we conclude that there is no warrant for a companywide bargaining order such as that requested, assuming *arguendo* the Board's power to enter such an order.[12]

For a somewhat similar reason we reject the proposal that the Respondent should now be ordered to bargain at such time in the future when, with respect to any appropriate single-store unit, it either secures a card majority or the Respondent becomes lawfully obligated to bargain with respect to such unit; for we are not now convinced that at no time in the future will the Respondent's employees be able to make a free choice with respect to their representatives. Furthermore, we do not agree with the contention of the General Counsel and the Charging Party that such a procedure as that proposed would provide speedier relief in appropriate cases because it would bypass normal Board procedures. Unless the parties were in complete agreement with respect to all matters pertaining to the representation issue, the disagreements would have to be resolved by some tribunal. In the circumstances postulated by this latter proposal, that tribunal would be the court of appeals acting upon exceptions to a report of a special master. There would be no guarantee that the proceedings before the special master would be any more expeditious than normal proceedings before

12. But see *J. P. Stevens & Co., Inc.*, 157 NLRB 869, 877; compare *N L. R. B.* v. *Gissel Packing Company, Inc.*, 395 U. S. 575, 612-614.

the Board; moreover the court of appeals or its appointed special master would thereby be deprived of the Board's administrative expertise in the consideration of such disputed matter.

5. Unlike most of the requests for nonmonetary relief, considered above, which presented questions of judgment as to the type of remedy that is appropriate in particular circumstances, the requests for monetary relief also require, at least in part, consideration of the Board's power to act. This is particularly true with respect to the request that the employees be made whole for loss of collective-bargaining benefits. We have in this connection fully considered the views of the court of appeals concerning the Board's power in this area, as expressed in its decisions in the *Tiidee* and *Ex-Cell-O* cases.[13] With all due respect to these views of the court, we remain convinced, as we stated in our decision in *Ex-Cell-O*,[14] that the Board lacks statutory authority to grant such relief. We will therefore adhere to our position in this matter unless and until the Supreme Court decides otherwise.

Moreover, assuming *arguendo* that we possess the necessary authority, we would nevertheless conclude that this is not an appropriate case in which to exercise such authority. In cases decided subsequent to its decision in *Tiidee*,[15] the court has held that *Tiidee* was inapplicable where the refusals to bargain rested on "debatable" issues, in contrast to the issues in *Tiidee*, which the court characterized as "patently frivolous." Here, as the Trial Examiner pointed out, in discussing the

13. See footnotes 3 and 5, *supra*.

14 *Ex-Cell-O Corporation*, 185 NLRB No. 20. For the reasons stated in the dissenting opinion in *Ex-Cell-O*, Member Brown disagrees with this conclusion, and he would grant the *Ex-Cell-O* remedy in this case.

15. *Steelworkers* v. *N. L. R. B. (Quality Rubber Mfg. Co.)*, 430 F. 2d 519 (C. A. D. C.); *Amalgamated Clothing Workers (Levi Strauss & Co.)* v. *N. L. R. B.*, 441 F. 2d 1027 (C. A. D. C., December 15, 1970); see also the court's June 9, 1971 decision in *Ex-Cell-O*, fn. 5, *supra*.

Respondent's contentions that the Union did not possess a majority in the appropriate unit, the Respondent introduced testimony which if fully credited and given its broadest possible sweep, would have resulted in the rejection of sufficient cards to have vitiated the Union's majority claim. Based on his resolutions of the credibility of the witnesses, the Trial Examiner found that the Respondent's contentions were without merit. With this finding we fully agree. As we understand the purport of the court's decisions in *Quality Rubber* and *Levi Strauss, supra,* as explicated and applied in its decisions in *Ex-Cell-O, supra,* it is not the court's view that because a defense is found to be without merit, it must necessarily be found to be "frivolous." As we understand the court's use of "frivolous" in this context, it refers to contentions which are clearly meritless on their face; the court did not, as we view its decisions, intend to label as "frivolous" a defense, the merit of which in the last analysis rests, as here and in *Quality Rubber* and *Levi Strauss,* upon a Trial Examiner's resolutions of credibility.

6. The request for reimbursement with respect to lost dues and fees also raises statutory questions relating to the applicability of section 302, which deals with restrictions on payments by employers to employee representatives. We do not, however, deem it necessary to resolve that statutory question for in our opinion there has been no predicate laid for a conclusion that the Union in fact has lost any dues or fees for reasons attributable to the Respondent's conduct. To make such a finding requires in our opinion a further finding that had the Respondent not refused to bargain, it would have entered into a union-security agreement with the Union which would have required payment of dues and fees to the Union as a condition of continued employment. While the execution of such an agreement is of course a possibility, we cannot conclude that it is so strong a probability that any loss of dues or fees must be deemed to have resulted from the Respondent's unlawful refusal to bargain.

7. Finally, there is the Union's request for reimbursement with respect to organizational costs and attorney's fees. In considering these questions we are not unmindful of the probability that the Charging Party has spent more money on organizational costs and attorney's fees than it would have spent had the Respondent not refused to bargain. It does not necessarily follow however, that the Union is entitled to reimbursement for such additional costs. In our opinion it would not on balance effectuate the policies of the Act to require reimbursement with respect to such costs in the circumstances here.

To determine the appropriateness of these reimbursement requests, we must, we believe, consider the role of a charging party under the statutory scheme in the light of the basic principles, that Board orders must be remedial not punitive,[16] and collateral losses are not considered in framing a reimbursement order.[17] As the Supreme Court has stated,[18] the statutory scheme involves an interblending of public and private interests, and the participation of a charging party in the proceedings, before the Board and in the courts, can serve a public as well as its own private interests. Nonetheless, it is the Board which has been given primary initial responsibility to determine and protect the public interest in the elimination of obstructions to commerce resulting from labor disputes. Such protection of the public interest as may result from the charging party's participation in litigation must be regarded, we believe, as incidental to its efforts to protect its own private interests. Given this statutory framework, we conclude that the public interest in allowing the Charging Party to recover the costs of its participation in this litigation

16. *Republic Steel Corporation* v. *N. L. R. B.*, 311 U. S. 7, 11-12.

17. *Gullett Gin Company, Inc.* v. *N. L. R. B.*, 340 U. S. 361, 364.

18. *Intl. Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 283* v. *Scofield*, 382 U. S. 205, 217, *et seq.*

does not override the general and well-established principle that litigation expenses are ordinarily not recoverable.[19]

As we have concluded that it would effectuate the policies of the Act to require the Respondent to take certain action in addition to the action previously ordered, we shall issue the following amended Order.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Heck's, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning their union membership, sympathies, or activities.

(b) Threatening employees that choice of a union as their collective-bargaining representative would lead to the closing of the store.

(c) Illegally polling employees in a nonsecret ballot election to ascertain which employees support the Union.

(d) Interviewing employees under coercive circumstances concerning matters relating to unfair labor practice charges and objections to an election.

(e) Refusing to bargain with Amalgamated Meat Cutters and Butcher Workmen of North America, Food Store Employees Union, Local No. 347, AFL-CIO, as the exclusive representative of its employees in the following appropriate unit:

19. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714-717. Compare *Newman* v. *Piggie Park Enterprises*, 390 U. S. 400, where litigation expenses were awarded under a statute (42 U. S. C. 2000a *et seq.*) which places greater reliance on private action for the vindication of public rights.

All employees of the Respondent's Clarksburg, West Virginia, store, excluding supervisors, guards and professional employees.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of all the Respondent's employees in the unit found to be appropriate and, if an agreement is reached, embody such understanding in a signed agreement.

(b) Post at each of its retail stores copies of the attached notice marked "Appendix,"[20] and mail a copy thereof to each of its employees. Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by the Respondent's representative, shall be posted and mailed immediately upon receipt thereof, and those posted shall be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by an other material.

(c) Upon request of the Union, made within 1 month of the date of this Decision, immediately grant the Union and its representatives reasonable access for a 1-year period to its bulletin boards and all places where notices to employees are customarily posted.

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20. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Upon request of the Union, made within 1 month of the date of this Decision, make available to the Union a list of names and addresses of all employees currently employed and keep such list current for a period of 1 year thereafter.

(e) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C.

[SEAL]

NATIONAL LABOR RELATIONS BOARD,

Edward B. Miller,

Chairman,

John H. Fanning,

Member,

Gerald A. Brown,

Member,

Howard Jenkins, Jr.,

Member,

Ralph E. Kennedy,

Member.

APPENDIX.

NOTICE TO EMPLOYEES.

Posted by order of the National Labor Relations Board an Agency of the United States Government

After a trial in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law and has told us to post this notice about what we are committed to do.

All our employees have the right to self-organization to form, join, or assist labor unions, and to bargain collectively through representatives of their own choosing.

We will not threaten to close any store because our employees select a union to represent them, or question our employees concerning their union sympathies, or activities, or membership, or illegally poll employees in a nonsecret ballot, or interview employees under coercive circumstances.

We will not in any other manner interefere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

We will recognize Amalgamated Meat Cutters and Butcher Workmen of North America, Food Store Employees Union, Local No. 347, AFL-CIO, as the bargaining representative of the employees in our Clarksburg, West Virginia, store. At the request of that Union we will bargain with it in good faith with respect to the terms and conditions of employment of the employees in that store, and we will embody in a signed contract any agreement reached.

We will mail a copy of this notice to all our employees.

We will grant the Union reasonable right to utilize our bulletin boards.

We will, upon the request of the Union, immediately give to the Union a list of names and addresses of all our employees and we will keep the list current for a period of 1 year.

All of our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named Union, or any other labor organization.

Heck's, Inc.,
(*Employer.*)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1536 Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222, Telephone 412—644-2977.

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1550

September Term, 1972

Food Store Employees Union, Local No. 347 Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO,

Petitioner,

v.

National Labor Relations Board,

Respondent.

Before: Bazelon, Chief Judge; McGowan and Leventhal, Circuit Judges.

ORDER

On consideration of respondent's petition for rehearing, it is

ORDERED by the Court that respondent's aforesaid petition is denied.

Per Curiam
For the Court:
HUGH E. KLINE
Clerk

Filed May 30, 1973.